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SUPREME COURT, U.S.

No. 80-5618

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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GEORGE MARISCAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the mailings on which his mail fraud convictions were premised were insufficient to make out a violation of the mail fraud statute, 18 U.S.C. 1341, and that the court of appeals misapplied the concurrent sentence doctrine in affirming his conviction.

1. Following a jury trial in the United States District Court for the District of Arizona, petitioner was convicted on 10 counts of interstate transportation of property obtained by fraud, in violation of 18 U.S.C. 2314, and on 12 counts of mail fraud, in violation of 18 U.S.C. 1341 (Pet. App. 1). He was sentenced to concurrent three-year terms of imprisonment on each count (Pet. 8). The court of appeals affirmed, relying on the concurrent sentence doctrine in declining to review petitioner's convictions on the 12 mail fraud counts (Pet. App. 1-7).

The facts of the case are summarized in the opinion of the court of appeals (Pet. App. 2-3). In brief, the facts are as follows: petitioner induced the City of Las Cruces, New Mexico, and the Las Cruces Industrial Development Board to authorize a $1.2 million bond sale to build a 4.4 acre greenhouse. The bond proceeds were held by the Security Trust Company and disbursed to

petitioner in 1974 and 1975. During that period he requisitioned and obtained $752,000 of the bond proceeds for construction, although in fact he diverted a substantial portion of that sum to his own use. Before the construction was completed, Security Trust Company foreclosed against petitioner's corporation and the construction funds were thereafter wholly exhausted.

The evidence further showed that petitioner had made various misrepresentations to the City of Las Cruces in the course of obtaining the city's authorization for the bond sale: he had overstated the extent to which two experts had approved his greenhouse project; he had grossly overstated the size of the facility to be built with the proceeds of the bond issue; and he had overstated the amount of his corporation's assets (Pet. App. 4). The jury found that petitioner's various misrepresentations established his intent to defraud, and the court of appeals upheld that finding (ibid.).

2. Petitioner contends (Pet. 11-14) that the court of appeals should not have applied the concurrent sentence doctrine in declining to review his convictions on the 12 counts of mail fraud. While apparently conceding that the concurrent sentence doctrine is applicable in some cases, petitioner argues that it should not have been applied in this case because the mail fraud convictions could expose petitioner to some additional adverse consequences, beyond those that would flow from his convictions on the 10 counts of violating 18 U.S.C. 2314.

We disagree. This is a classic case for applying the concurrent sentence doctrine. Petitioner's convictions for interstate transportation of property obtained by fraud refer to precisely the same fraudulent course of conduct that was the subject of the mail fraud counts. As the court of appeals observed, petitioner's fraudulent conduct led the City of Las Cruces to authorize the bond sale and to disburse $752,000 in construction funds to petitioner. That fraudulent course of

conduct was the subject of both the 10 transportation counts and the 12 mail fraud counts. Because the jury had to find that the property transported under the transportation counts had been obtained by fraud, the jury necessarily found petitioner's course of conduct to be fraudulent for the purposes of both sets of convictions. Thus, petitioner's parole status will be the same regardless of whether the mail fraud counts are taken into account.

Under the Parole Commission guidelines, 28 C.F.R. 2.20, property offenses such as fraud and interstate transportation of property obtained by fraud are treated similarly. The severity rating for such offenses is measured by the amount of money involved in the offense. Thus a property offense involving less than $20,000 can be classified as an offense of "low," "low moderate," or "moderate" severity; a property offense involving betweeen $20,000 and $100,000 is a "high" severity offense; a property offense involving between $100,000 and $500,000 is a "very high" severity offense; and a property offense involving more than $500,000 is considered one of "greatest" severity. In determining the severity of an offense, the Parole Commission is not limited to consideration of only those counts on which the prisoner has been convicted; rather, it may take into account information from a variety of sources concerning the nature of the prisoner's criminal conduct. See, e.g., United States ex rel. Goldberg v. Warden, 622 F.2d 60 (3d Cir. 1980), cert. denied, No. 80-66 (Oct. 6, 1980).

Thus, contrary to petitioner's contention (Pet. 12), the mail fraud counts will have no effect on his "severity rating." Nor will the mail fraud counts in any way affect his "salient factor score," which is calculated mainly on the basis of personal history and background factors, not on the circumstances of the offense in question. See 28 C.F.R. 2.20. And finally, while petitioner makes a general claim that he may be affected by

the mail fraud counts in some future prosecution, he does not specify how he might be independently prejudiced in any future proceeding by the presence of his mail fraud convictions, in light of the existence of his valid convictions for transportation of property obtained by fraud. In sum, this case represents a perfectly unobjectionable application of the concurrent sentence doctrine, a doctrine that has been approved by this Court. United States v. Barnes, 412 U.S. 837, 848 (1973); Andresen v. Maryland, 427 U.S. 463, 469 n.4 (1976).[1/]

2. Petitioner further contends (Pet. 8-11) that the mailings in this case were not sufficient to establish a violation of the mail fraud statute, 18 U.S.C. 1341. Of course, if we are correct that the concurrent sentence doctrine was properly invoked in this case, it is unnecessary for this Court to consider the validity of the mail fraud convictions. However, if the Court believes it necessary to reach the merits of the mail fraud convictions, it is our conclusion that, under the authority of Kann v. United States, 323 U.S. 88 (1944), the mail fraud convictions would have to be reversed.

The facts relating to the unlawful mailings in this case are as follows: when petitioner requested the release of the bond funds, the Security Trust Company, in Albequerque, New Mexico, would issue a check to petitioner, which petitioner would transport to Arizona and deposit in a Phoenix bank. The Phoenix bank would then return the check by mail to the drawee bank in Albuquerque. The mailings from Phoenix to Albuquerque were the mailings that formed the basis for the mail fraud counts.

1/ The cases on which petitioner relies (Pet. 11-12), United States v. Holder, 560 F.2d 953 (8th Cir. 1977), and United States v. Tanner, 471 F.2d 128 (7th Cir.), cert. denied, 409 U.S. 949 (1972), are not helpful to him. Those cases merely stand for the proposition that the concurrent sentence doctrine should not be applied where the defendant could suffer added collateral consequences from the unreviewed convictions. We agree with that rule, of course, but we disagree that there are any such adverse consequences facing petitioner in this case.

sufficiently related to the fraudulent scheme to bring his conduct within the reach of the mail fraud statute.

We believe that petitioner's point is well taken. In Kann v. United States, supra, the defendants fraudulently obtained checks payable to them, which they cashed or deposited at a bank. The checks were then mailed for collection to the drawee bank. This Court held that the fraud was completed at the point at which the defendants cashed the checks. The Court wrote (323 U.S. at 94; footnote omitted):

> The scheme * * * had reached fruition. The persons intended to receive the money had received it irrevocably. It was immaterial to them, or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank. It cannot be said that the mailings in question were for the purpose of executing the scheme, as the statute requires.

See also Parr v. United States, 363 U.S. 370 (1960); United States v. Maze, 414 U.S. 395 (1974).

As in Kann, petitioner had obtained the fruits of his fraud by the time he deposited the Security Trust Company checks in his Phoenix bank. Of course it was important to the continued success of the scheme that each check be collected when the Phoenix bank sent it to the Albuquerque bank for collection. But, as we read the Kann case, a continuing interest in seeing that the drawee bank pay the payor bank each time a fraudulently obtained check is presented is not a sufficient interest to bring the inter-bank mailings within the reach of the mail fraud statute.

Because the court of appeals properly applied the concurrent sentence doctrine in this case, it is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. McCREE, JR.
Solicitor General

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